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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-741

MIZOKAMI BROS. OF ARIZONA, INC., an Arizona corporation,
Petitioner,

v.

BAYCHEM CORPORATION, a New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; and BAYER AG, a corporation of the Federal Republic of Germany,
Respondents.

BRIEF OF BAYER AG IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JACK E. BROWN
PHILIP R. HIGDON
EUGENE D. COHEN
222 North Central Avenue
Phoenix, Arizona
Attorneys for Respondent, Bayer AG

Of Counsel:

BROWN & BAIN, P.A.
222 North Central Avenue
Phoenix, Arizona

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OPINION BELOW

The opinion of the court of appeals affirming the judgment of the district court dismissing the complaint for lack of personal jurisdiction and on the ground of *forum non conveniens* has been reported in 556 F.2d 975 (9th Cir. 1977). The court rendered no opinion with its order denying the petition for rehearing.

RESTATEMENT OF THE QUESTIONS PRESENTED

The Petition's statement of the questions presented subsumes fundamental factual misstatements and erroneous legal conclusions, wholly unsupported by the record. For example, there is no evidence in the record (and it has not heretofore been suggested) that any sales relevant to this action were made in Arizona; there is no evidence in the record that Bayer AG (or, for that matter, Bayer de Mexico) had any knowledge of Petitioner prior to the commencement of this action, much less that Bayer AG "knew" that Petitioner had purchased insecticide from a distributor of Bayer AG's Mexican subsidiary and intended to use it on crops for shipment into Arizona; the evidence is uncontroverted that no Respondent was authorized to or did act as agent for any other Respondent at any time; and evidence is totally lacking to support Petitioner's conclusion that Bayer AG dominated or controlled its subsidiaries Baychem and Bayer de Mexico. Accordingly, the questions presented are not those stated in the Petition. Rather, the questions presented as to Bayer AG are as follows:

1. Did the court of appeals correctly affirm the district court's dismissal of Petitioner's complaint against Bayer AG for lack of personal jurisdiction where (a) Bayer AG had no contact with the State of Arizona (or any other state in the United States) except through the presence of a once-removed and wholly-independent subsidiary (Baychem) and (b) Petitioner's claim is based upon the effects of alleged misrepresentations in Mexico by a once-removed Mexican subsidiary (Bayer de Mexico) in connection with the sale in Mexico of a pesticide by an independent Mexican distributor (defendant Vamex) to growers in Mexico with whom Petitioner (or Petitioner's

Mexican subsidiary) allegedly had some dealings in Mexico?

2. Did the court of appeals correctly hold that the district court did not abuse its discretion in dismissing Petitioner's complaint on the ground of *forum non conveniens* where (a) the more convenient forum for litigating this matter is Mexico because the case necessarily turns on facts to be ascertained from Mexican residents and corporations in Mexico and on Mexican law and (b) there is no federal district court to which this case could be transferred?

RESTATEMENT OF THE CASE

Petitioner's statement of the case requires correction by specific reference to the record because it fails to acknowledge the following relevant aspects of the case:

First, Petitioner's statement creates the false impression that the alleged events that form the basis of Petitioner's claim took place in Arizona rather than Mexico. In fact, Petitioner's complaint sets forth purported causes of action against Bayer AG based upon alleged misrepresentations and breaches of warranty in Mexico concerning the use of a pesticide ("Tamaron") sold to Mexican growers (with whom Petitioner or its Mexican subsidiary had dealings in Mexico) by an independent Mexican distributor (defendant Vamex) of a once-removed Mexican subsidiary of Bayer AG (Bayer de Mexico). [R. 17-24, 95]* All events which purportedly took place in Arizona arose entirely from the decision by a subsidiary of Petitioner (or growers with whom Petitioner's subsidiary dealt) to ship a portion of a Mexican crop through an Arizona port of entry and thus occurred subsequent to all the alleged acts of the

*This refers to pages from the record on appeal.

Respondents. Pointedly, Petitioner's claim that misrepresentations were made and warranties were breached must rise or fall on the testimony of the persons in Mexico who were parties to those alleged transactions.

Second, Petitioner's statement that "Petitioner financed growers in Mexico, advancing them funds for the growing of bell peppers and other vegetables" [Petition at 6] obscures the fact that the party which dealt with the Mexican growers and allegedly acquired their crops (or some interest therein) was not Petitioner but, in the main, a Mexican subsidiary. Petitioner's own interrogatory answers confirm that it contracted "through its Mexican subsidiary to buy all the crops" at issue [R. 1045] and that its role was limited to advancing funds to its Mexican subsidiary [R. 1047].

Third, there is no support in the record for Petitioner's assertions that Bayer AG (or Baychem or Bayer de Mexico) had any knowledge of Petitioner or that the pesticide purchased by the Mexican growers with whom Petitioner (or its Mexican subsidiary) had dealings was to be used on crops which Petitioner intended to export from Mexico into Arizona and for consumption in the United States and Canada [Petition at 7]. Indeed, to "support" its statements, Petitioner cites only its complaint. [*Id.*]

Fourth, Petitioner's sweeping assertion that Bayer AG "dominates and controls its subsidiaries and agents, Baychem and Bayer de Mexico" [Petition at 14] is wholly unsupported by the record. Apart from its complaint [R. 10], Petitioner cites only its own summary of Respondents' responses to interrogatories [R. 1265-70]. Those responses, fairly read, evidence nothing more than the typical, ordinary relationship to be expected between a parent and its subsidiary corporations organized and operated as separate

companies. [R. 93-95, 97, 102, 104, 243, 287, 301, 314, 346, 359, 361, 366, 1008, 1010-11, 1019]* Completely lacking is any evidence of the kind which would, under the decided cases, have to be shown at a minimum before a court would be warranted in ignoring the separateness of the subsidiary and treating it as the alter ego or agent of the parent.

Fifth, Petitioner's repeated citations to its answers to interrogatories propounded by Baychem at R. 1049 and R. 1060 to buttress its assertions that Petitioner ordered the Tamaron from Vamex in Arizona and paid by checks drawn on an Arizona bank [*e.g.*, Petition at 7, 11] are a complete mystery. Those references show only that Petitioner claims to have spent money on insecticides, that Tamaron was purchased from Vamex "many times" for "use on plaintiff's crops" (without reference to where or by whom the purchases were made) and that Petitioner would supply specific information on each transaction at a later date (which it never did). Thus, the record does not support even this purported nexus between Arizona and the alleged transactions at the heart of Petitioner's claim.

Other errors which pervade Petitioner's statement of the case may be seen from the facts of the case recited in the opinion of the court of appeals.

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*Bayer de Mexico, which does business only in Mexico [R. 102, 104], is a subsidiary of Bayer Foreign Investments, Ltd., a Canadian corporation, which in turn is a subsidiary of Bayer AG [R. 95]. It is independently financed with a capital stock of 50 million Mexican pesos. [R. 97] Bayer de Mexico is not authorized in any way to act as Bayer AG's agent for any purpose. [R. 95] It operates as an independent business under the control of its own board of directors, maintains its own corporate books and records and conducts its own business in all respects as a separate concern. [*Id.*]

Baychem, a subsidiary of a Netherlands Antilles corporation which is a subsidiary of Bayer AG, is established and operates independently in the United States with a separate paid-in capitalization of more than $75 million. [R. 95]

The businesses of Bayer de Mexico and Baychem are entirely distinct from the substantial separate manufacturing operations of Bayer AG in Germany. [R. 93, 94]

REASONS FOR DENYING THE WRIT

I

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS THAT THE DISTRICT COURT DOES NOT HAVE JURISDICTION OVER BAYER AG IS CONSISTENT WITH INTERPRETATIONS BY ARIZONA COURTS OF THE ARIZONA LONG-ARM STATUTE AND WITH THIS COURT'S REQUIREMENTS OF CONSTITUTIONAL DUE PROCESS.

A. As a Matter of Arizona Law, Bayer AG Has Not Caused an Event to Occur in Arizona Out of Which the Claim Which Is the Subject of the Complaint Arose.*

Jurisdiction over Bayer AG is purportedly based upon Ariz. R. Civ. P. 4(e)(2) which provides for service of process upon corporations which have "caused an event to

*Preliminarily, Petitioner's argument that "the pleadings and other material should be construed favorably to the Plaintiff" [Petition at 23] stands on its head the long-standing rule of this Court that, once the existence of personal jurisdiction is appropriately challenged, the party asserting jurisdiction has the burden of establishing it and that a *factual* showing is required, beyond the mere allegations of the complaint. McNutt v. General Motors Acceptance Corp., 298 U.S. 178 (1936). Petitioner has failed to make the requisite factual showing.

Petitioner's plea that the jurisdiction question be reserved until trial [Petition at 23] has no merit. Contrary to the assertion that Respondents have "so far resisted" discovery [*id.*], all three Respondents answered exhaustive interrogatories and submitted lengthy affidavits setting forth the facts relevant to the jurisdictional issue. [R. 93-108, 140-46, 233-342, 343-760, 976-1038] Moreover, as noted in 2A *Moore's Federal Practice* ¶ 12.16, at 2352-54 (2d ed. 1975):

> "The emphasis of [Rule 12] (d) is in the direction of hearing such defenses prior to trial. Certainly it will be advisable generally to decide such defenses as lack of jurisdiction . . . of the person . . . promptly after they are raised, and not defer them to the trial."

Petitioner has raised nothing to warrant a deviation from this established procedure.

In any event, besides not meeting its burden of establishing jurisdictional *facts*, Petitioner has not satisfied the substantive requirements of Arizona law.

occur [in Arizona] out of which the claim which is the subject of the complaint arose."* Whether a defendant has caused an event to occur in Arizona within the meaning of Ariz. R. Civ. P. 4(e)(2) is, of course, a matter of Arizona law.

The Arizona Supreme Court has clearly stated that, to establish jurisdiction over a foreign defendant under the "caused an event" test of Rule 4(e)(2), the damage-causing *events* must have occurred in Arizona, "rather than merely the *effects* of those events." *Houghton v. Piper Aircraft Corp.*, 112 Ariz. 365, 542 P.2d 24, 28 (1975) (emphasis in original). Under the theories of Petitioner's complaint, all the alleged damage-causing *events* (misrepresentation by Bayer de Mexico or Vamex, breach of warranty by Bayer de Mexico or Vamex, violation of Mexican labeling laws by Bayer de Mexico or Vamex) took place in Mexico; only the alleged *effects* of those events (rejection of the crops, embargo, Petitioner's decision not to further finance exports) took place in Arizona. Thus, as a matter of Arizona law, no event has occurred in Arizona out of which the claim which is the subject of the complaint arose.

Petitioner cites only *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966), to support its contention that an Arizona court would have found that Bayer AG "caused an event to occur" in Arizona within the meaning of Rule 4(e)(2). That reliance is misplaced.

Phillips is a product liability case in which an Arizona resident sued the manufacturer of an allegedly defective baking dish for injuries sustained in Arizona when the

*Ariz. R. Civ. P. 4(e)(2) reads in pertinent part as follows:

> **"Summons; personal service out of state.** When the defendant is . . . a corporation . . . which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose, service may be made as herein provided, and when so made shall be of the same effect as personal service within the state."

baking dish broke in the plaintiff's hand. The Arizona Supreme Court sustained jurisdiction explaining that "[i]f [a manufacturer's] product is defective" jurisdiction may be sustained in the plaintiff's state if that was where the product was "consumed." 413 P.2d at 737-38.

The present case has none of the jurisdictional facts extant in a product liability case: Bayer AG did not manufacture the product Tamaron; the complaint does not allege that the product was defective, but simply that there were misrepresentations and breaches of warranty in Mexico concerning its registration for use on certain vegetables; and, in any meaningful sense, no injury occurred from the consumption of a product in Arizona.

More importantly, the very factors considered by *Phillips* "in determining whether it is fair to exercise jurisdiction over a nonresident manufacturer whose product has injured a resident plaintiff in this state" [413 P.2d at 738] lead necessarily to the conclusion that exercising jurisdiction would have been improper here. These considerations were: (1) the size and nature of the manufacturer's business; (2) the "economic independence of the plaintiff" ("he may not be able to afford a trip to another jurisdiction to institute suit" and "he may feel unable to cope with the prospect of traveling to a strange state") and (3) the nature of the cause of action and the location and availability of witnesses. *Id.*

Under the guidelines set forth in *Phillips:*

(1) Bayer AG did not manufacture the product Tamaron;

(2) Petitioner is not an impecunious consumer "unable to cope with the prospect of traveling" to the place of the alleged misrepresentations and breaches of warranty to bring its suit. Mexico is hardly "strange" to Petitioner which does business there and maintains a subsidiary there [R. 1045, 1047]; and

(3) Since the alleged misrepresentations and breaches of warranty took place in Mexico between Mexican residents [R. 1043-46, 1058, 1121-29], the location and otherwise questionable availability of the witnesses to these events further point to the unfairness of exercising jurisdiction over Bayer AG in Arizona.

Even assuming that the district court could extend its jurisdiction over Bayer de Mexico under Petitioner's theory, no proper basis exists for reaching beyond that company to Bayer AG in Germany. Such an extraordinary double (indeed, quadruple) jump would subject a foreign corporation to jurisdiction merely because one of its subsidiaries allegedly had knowledge of the marketing intentions of persons whose very existence was unknown to the foreign parent corporation. *Cf., Taylor v. Portland Paramount Corp.,* 383 F.2d 634 (9th Cir. 1967).

B. Any Decision Other Than the Ninth Circuit's, That the District Court Did Not Have Jurisdiction Over Bayer AG, Would Offend the Guarantee of Due Process.

The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee that a nonresident foreign corporation cannot be subjected to personal jurisdiction absent a satisfactory showing both that: (1) the defendant's activities establish a nexus of "minimum contacts" with the forum jurisdiction, it being "essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws" [*Hanson v. Denckla,* 357 U.S. 235, 253 (1958)]; and (2) the "maintenance of the suit [in the forum] does not offend 'traditional notions of fair play

and substantial justice.'" [*International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)].

The dismissal ordered by the district court was especially appropriate in light of those due process requirements.

Petitioner's sole basis for asserting jurdisdiction over Bayer AG is that a minor portion of the crops containing a residue of a product distributed by Bayer AG's once-removed subsidiary in Mexico found their way into Arizona. Since it was Petitioner's unilateral activity that took the crops from Los Mochis, Sinoloa, Mexico to Nogales, Arizona [R. 779], the teaching of *Hanson v. Denckla,* that "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State" [357 U.S. at 353], is directly opposed to Petitioner's jurisdictional claim. Indeed, the reasoning urged by Petitioner would inevitably lead to the absurd conclusion that Bayer AG could be sued in any state chosen by Petitioner as the point of entry for its crops, notwithstanding that Petitioner has exclusive control over where it chooses to transport the crops and Bayer AG has not in any way "avail[ed] itself of the privilege of conducting activities within the [chosen] forum state" [*id.*].*

Surely this is a case where Arizona's "contacts with the [alleged] cause of action are far too tenuous to merit subjecting the foreign corporation to suit here" and where, even giving full play to Petitioner's attempt to reach Bayer AG vicariously, the status of Bayer AG as "an effectively

*As shown in the previous discussion of Phillips v. Anchor Hocking Glass Corp., the present case has none of the salient features of a product liability case; accordingly, the product liability cases cited by Petitioner [Petition at 21] are as inapplicable to the constitutional issues as Phillips is to the "caused an event" question under Arizona law.

independent corporate entity—certainly not in a position conveniently to defend an action here—[is such] that to subject it to judicial process in [Arizona] . . . would be to impose an unconstitutional burden" [*Blount v. Peerless Chemicals (P.R.) Inc.,* 316 F.2d 695, 699, 700 (2d Cir. 1963)].

II

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY OTHER CIRCUIT IN HOLDING THAT THIS SUIT WAS PROPERLY DISMISSED ON GROUNDS OF *FORUM NON CONVENIENS* SINCE THE MORE CONVENIENT FORUM IS IN A FOREIGN COUNTRY.

Contrary to the Petitioner's contention, the enactment of 28 U.S.C. § 1404(a) (1976)* has not changed the rule that dismissal is proper under the doctrine of *forum non conveniens* where venue is more conveniently laid in a foreign country:

> "If the more convenient forum is another federal court, since 1948 the case can be transferred there under Section 1404(a) and there is no need for dismissal. *It is only when the more convenient forum is in a foreign country*—or perhaps, under rare circumstances, in a state court—*that a suit brought in a proper federal venue can be dismissed on grounds of forum non conveniens. Questions of forum non conveniens continue to arise with some regularity in*

*28 U.S.C. § 1404(a) (1976) provides as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

maritime cases and in other *cases involving foreign transactions.*"

15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3828, at 176-78 (1976) (emphasis added; footnotes omitted). Thus, where prosecution of the suit is more appropriate in a foreign jurisdiction, the federal courts retain "the inherent power . . . to refuse jurisdiction" and to dismiss such actions. *Prack v. Weissinger,* 276 F.2d 446, 448 (4th Cir. 1960). At least four circuits have so held,* and none has held to the contrary.

The cases cited by Petitioner as being to the contrary do not conflict with this rule.

Norwood v. Kirkpatrick, 349 U.S. 29 (1955), involved no foreign parties and no foreign transactions. The only issue in *Norwood* was whether the transfer of a case under 28 U.S.C. § 1404(a) (1976) from the Eastern District of Pennsylvania to the Eastern District of South Carolina was proper, even though the factors which led to the transfer would not have been a sufficient showing of inconvenience to warrant dismissal for *forum non conveniens* prior to enactment of the statute in 1948. The holding of *Norwood*—that the statute was "intended to permit courts to grant transfers upon a lesser showing of inconvenience" than that required by *forum non conveniens* [349 U.S. at 32] and that the order of transfer was proper—in no way conflicts

E.g., Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633 (2d Cir.), *cert. denied,* 352 U.S. 871 (1956); Prack v. Weissinger, 276 F.2d 446 (4th Cir. 1960); J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd., 462 F.2d 998 (8th Cir. 1972); Paper Operations Consultants Int'l, Ltd. v. SS Hong Kong Amber, 513 F.2d 667 (9th Cir. 1975); and Yerostathis v. A. Luisi, Ltd., 380 F.2d 377 (9th Cir. 1967). *See also* Gross v. Owen, 221 F.2d 94 (D.C. Cir. 1955) (where more convenient forum was in a state court and case could not be transferred to another federal court, dismissal for *forum non conveniens* was proper).

with the Ninth Circuit's determination in this case that, under the stricter doctrine of *forum non conveniens,* venue is more properly set in a foreign country and the action should be dismissed.

Similarly, none of the other cases relied upon by Petitioner to show a conflict among circuits [Petition at 15] involved a foreign country as the more proper venue.*

Without attempting to list all the factors warranting the Ninth Circuit's (and the district court's) conclusion that Mexico is the more proper venue for adjudicating this case, it should be noted that, contrary to Petitioner's assertion that all the necessary witnesses are in Arizona, the fact is that all of the growers who purchased the Tamaron product from Vamex and to whom representations and warranties concerning use of the product on vegetables were allegedly made reside in Mexico; the alleged misrepresentations were made in Mexico by citizens of Mexico; the product was allegedly applied in Mexico; Petitioner (or its subsidiary) allegedly purchased the vegetables in Mexico; and two of the defendants in the action (Bayer de Mexico and Vamex) are located in Mexico. It would be extremely unfair to any defendant to require defense of the action outside Mexico, where all the relevant alleged events took place, where all

*Harbolt v. Carpenter, 536 F.2d 791 (8th Cir. 1976) (suggested venue: District of Kansas); Collins v. American Auto. Ins. Co., 230 F.2d 416 (2d Cir. 1956) (suggested venue: Eastern District of Louisiana); Kisko v. Penn Central Transp. Co., 408 F. Supp. 984 (M.D. Pa. 1976) (suggested venue: Western District of New York); B.M.Heede, Inc. v. West India Mach. & Supply Co., 272 F. Supp. 236 (S.D.N.Y. 1967) (suggested venue: District of Puerto Rico).

Moreover, Petitioner's intimation that the *forum non conveniens* doctrine may not be invoked to dismiss a case brought by a United States citizen [Petition at 15, 17] is squarely refuted by J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd., 462 F.2d 998 (8th Cir. 1972) (dismissing suit brought by an American corporation).

the witnesses who might have knowledge thereof are resident and where, under Arizona's "contacts theory" in choice-of-law cases, the law of Mexico must necessarily govern the substantive issues [*see Schwartz v. Schwartz,* 103 Ariz. 562, 447 P.2d 254 (1968)].

In sum, the district court did not abuse its discretion in applying *forum non conveniens* and the Ninth Circuit followed a unanimous line of authority in affirming.

III

NEITHER THE JURISDICTIONAL ISSUE, WHICH MAY BE DECIDED UNDER ARIZONA LAW WITHOUT REACHING PETITIONER'S CONSTITUTIONAL ARGUMENT, NOR THE *FORUM NON CONVENIENS* ISSUE, WHICH RELATES ONLY TO THE PROPRIETY OF THE DISTRICT COURT'S EXERCISE OF ITS DISCRETION, MERITS THIS COURT'S ATTENTION.

Petitioner admits that, to establish jurisdiction over the foreign defendants, it must first fulfill the requirements of Ariz. R. Civ. P. 4(e)(2). [Petition at 19] The interpretation and application of Arizona's rules of civil procedure are matters of Arizona law. Since, as shown, Petitioner has failed, with respect to Bayer AG, to meet the "caused an event" test under Arizona authority, the constitutional issue raised by Petitioner need not be reached. A review of the application of an Arizona rule under Arizona decisions hardly warrants this Court's attention.

Concerning *forum non conveniens,* the only issue before this Court is whether the Ninth Circuit correctly held that the district court did not abuse its discretion in applying the doctrine and ordering a dismissal under the unique set of facts presented here. As the commentators have expressed the dictates of this Court, "appellate review is limited" "[b]ecause the application of forum non conveniens rests

heavily on the discretion of the trial court." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3828, at 192 (1976), *citing The Belgenland,* 114 U.S. 355, 368 (1885). Since the rules governing the application of the doctrine of *forum non conveniens* have been clearly set out by this Court [*e.g., Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947)], and since there is unanimity among the circuits that the doctrine may be applied to cases in which the more proper venue is laid in a foreign country, there is nothing raised by Petitioner's argument that deserves this Court's consideration.

CONCLUSION

For the foregoing reasons, the Court should decline to review this case by writ of certiorari.

December 21, 1977

Respectfully submitted,

JACK E. BROWN
PHILIP R. HIGDON
EUGENE D. COHEN
222 North Central Avenue
Phoenix, Arizona

Attorneys for Respondent, Bayer AG

Of Counsel:

BROWN & BAIN, P.A.
222 North Central Avenue
Phoenix, Arizona